

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders reserved on 21.09.2021	Orders pronounced on 08.10.2021
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Coram
THE HONOURABLE Mr. JUSTICE G.CHANDRASEKHARAN

C.R.P.(NPD) No.1992 of 2021
and
C.M.P.No.15164 of 2021

1. M/s.Chandan Pharmaceuticals Corporation
represented by its Partner
Harish Kumar Mehta
No.62, Burkit Road,
Chennai – 17.
 2. L.Harish Kumar Mehta ... Petitioners
- Vs
1. P.K.Jalan
 2. J.K.Iron and Steel Manufacturing Company
represented by its Partner B.K.Jalan
No.218, Linghi Chetty Street
Chennai – 600 001.
- C.Lakshmichand Mehta (deceased)
3. L.Udayakumar Mehta
 4. L.Shanta Mehta
 5. L.Sasikala Mehta
 6. L.Lalitha Mehta

7. L.Vijayalakshmi Mehta
8. L.Sowbagyavathi Mehta ... Respondents
- (first defendant died on 17.06.1995.
The defendants/respondents 3 to 8
have been added as legal
representatives, as per order passed in
memo dated 07.10.1996)

Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order dated 09.03.2021 in E.A.No.5 of 2020 in E.P.No.1950 of 2006 in O.S.No.6686 of 1996 on the file of learned X Assistant Judge, City Civil Court, Chennai.

For Petitioners ... Mr.P.Sunil

For Respondents 1 & 2/ ... Mr.G.Krishnakumar
Caveator

ORDER

This petition is filed challenging the order passed in E.A.No.5 of 2021 in E.P.No.1950 of 2006 in O.S.No.6686 of 1996 on the file of X Assistant City Civil Court, Chennai.

2. E.A.No.5 of 2020 was filed under Section 5 of the Limitation Act to condone the delay of 912 days in filing the petition to

restore the E.P.No.1950 of 2006. The trial Court allowed this petition on payment of costs of Rs.5,000/- to the petitioners. Against the said order, this Civil Revision Petition is preferred.

3 Learned counsel for the petitioners submitted that Section 5 of the Limitation Act is not applicable to the proceedings under Order XXI Rules 105 and 106 CPC. Therefore, filing a petition under Section 5 of Limitation Act and Order XXI Rule 105 (3) CPC for condonation of delay and allowing the petition is not correct. Hosts of judgments have been placed before this Court in support of the applicability and non-applicability of Section 5 of the Limitation Act in EP proceedings. Learned counsel for the petitioners heavily relied on the judgment reported in **1989 (1) LW 178 in (N.M.Natarajan ..vs.. Deivayanai Ammal and others)** for the proposition that Section 5 of the Limitation Act, 1963 is not applicable to the petition filed for setting aside the orders passed exparte in proceedings under Order XXI CPC. The relevant portion reads as under:-

“3. The important question that arises for consideration in this revision petition is about the

*applicability of Madras R.105(4) of O 21 C.P.C, framed by this Court in the exercise of its powers under S.122 of the Code, which came into effect on 04.09.1945, applying the provisions of S.5 of the Limitation Act, 1908 to applications under O.21 R.105(1) of the Code. When the above civil revision petition came before Kader, J., the learned Judge referred the matter to a Bench on the ground of conflict of decisions between the judgment of Mohan, J., in **Ayyappa Naicker ..vs.. Subbammal and another (1984-1-MLJ 214)** and the judgment of Balasubrahmanyam, J. in **Subramania Mudali ..vs.. Srinivasa Pillai and another (1979-2-MLJ-373)** regarding the question of the application of the provisions of S.5 of the Limitation Act, 1963, to applications under O.21 of the C.P.Code. Therefore, the matter comes before us on reference.*

....

8. We have already noticed that there was a specific provision in sub R.(4) of R.(105) specifically providing for the application of the provisions of S.5 of the Indian Limitation Act, 1908, and therefore, there was no difficulty in applying the said provisions before the amended Act came into force. We find that there is no corresponding provision in the

amended Act and R.(106) of O.21 is silent about its applicability of the provisions of S.5 of the Limitation Act.

9.

10. *We are unable to agree with the said contentions. The language of the section itself is clear that the Court has got jurisdiction to enlarge time where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Code. The Court cannot exercise its powers under this provision to excuse the delay in filing an application under Order 21, Rule 106, C.P.C., since the period is fixed by the statute.*

11.

12. *In the result, we hold that S.5 of the Limitation Act, 1963 is not applicable to a petition filed for setting aside the orders passed ex parte under R.106 of O.21 CPC., and the provisions contained in sub R.(4) of R.105 (Madras Amendment) is no longer in force. Accordingly, the civil revision petition is allowed...* ”

4. He also relied on the following judgments for the same proposition ie., Section 5 of the Limitation Act is not applicable to Order

XXI Rules 105 and 106 proceedings.

(i) (2005) 7 SCC 300 (*Damodaran Pillai and others ..vs..*

South Indian Bank Ltd.,), which reads as under:-

“9. Sub-rule (3) of Rule 106 provides for the period of limitation for filing such an application which reads as under:

"An application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex-parte order, the notice was not duly served, within thirty days from the date when the applicant had knowledge of the order.

10.

11.

12. We may notice that the period of limitation has been fixed by the provisions of the Code and not in terms of the second schedule appended to the *Limitation Act*, 1963.

13.

14. It is also trite that the civil court in absence of any express power cannot condone the delay. For the purpose of condonation of delay in absence of applicability of the provisions of *Section 5* of the *Limitation Act*, the court cannot invoke its inherent power.

15. *It is well-settled that when a power is to be exercised by a civil court under an express provision, the inherent power cannot be taken recourse to.*

16. *An application under Section 5 of the Limitation Act is not maintainable in a proceeding arising under Order XXI of the Code. Application of the said provision has, thus, expressly been excluded in a proceeding under Order XXI of the Code. In that view of the matter, even an application under Section 5 of the Limitation Act was not maintainable. A fortiori for the said purpose, inherent power of the court cannot be invoked."*

(ii) **2018 SCC OnLine Mad 4604 (M.Raji and others ..vs.. Arulmigu Komaleeswarar Devasthanam);** The relevant portion reads as follows:-

"12.

particularly Rule 106 (3) would clearly demonstrate that the provision of Section 5 of the Limitation Act, is not available for petitions filed to set aside the ex parte orders under any of the provisions of Order 21 as the period of limitation is embodied in Rule 106 of Order 21 of the Code itself.

13.The Judgments relied upon by the learned Revision petitioner confirm this position. In the Judgment reported in 1989-1-L.W. 178 (N.M.Natarajan v. Deivayanai Ammal and others), the Division Bench of this Hon'ble Court has passed the following orders:

The Court cannot exercise its powers under this provision to excuse the delay in filing an application under O.21, R.106, C.P.C., since the period is fixed by the Statute.

14. Therefore, the impugned order, which has overlooked this statutory provision only on the ground that the petitioner being an idol its interest should be protected by the Court is per se erroneous, inasmuch as the provision of Order 21 Rule 106 of the Code, is applicable to all.”

and

(iii) Order of this Court dated 13.08.2019 in CRP. (NPD)

No.3409 of 2014. The relevant portion is extracted hereunder:-

“10. As seen from Order XXI Rule 106 (3) CPC, an application to set aside the exparte order in an Execution Petition will have to be filed within a period of 30 days from the date of the order. The Hon'ble Supreme Court of India has held in the case of Damodaran Pillai and others vs. South Indian Bank Limited reported in 2005 AR SC 3460, that an application under Order XXI Rule 106 of CPC has to be filed within 30 days from the date of

the order and not from the date of knowledge.

11. It is clear from the aforesaid paragraphs that the Civil Court in the absence of any express power cannot condone the delay. In the instant case, the exparte order was passed in the Execution Petition R.E.P. No.128 of 2013 on 07.06.2013, whereas the application REA No.276 of 2013 was filed by the respondent under Order XXI Rule 106 CPC only on 04.10.2013. It is clear from Order XXI Rule 106 CPC that an application to set aside the exparte order has to be filed within a period of 30 days from the date of order. But, in the instant case, the said application has been filed beyond the period of 30 days. Hence, this Court is of the considered view that the application filed by the respondents in REA No.276 of 2013 is not maintainable. The respondents have filed the application only under Order XXI Rule 106 CPC and this being the case, as held by the Hon'ble Supreme Court of India, it is well settled that when a power is to be exercised by the Civil Court under an express provision, the inherent power cannot be taken recourse to. It is also made clear by the decision referred to above of the Hon'ble Supreme Court of India that an application to set aside the exparte order will have to be filed under Order XXI Rule 106 CPC within a period of 30 days and not from the date of knowledge. Further in the instant case,

the exparte decree dated 23.11.2012 passed in O.S. No.4 of 2012 has also attained finality, since no application as on date is pending on the file of the Trial Court to set aside the exparte decree. Even the earlier application filed by the respondents to set aside the exparte decree has also been dismissed for default.”

5. Learned counsel for the respondents 1 and 2/caveators submitted that the judgment reported in **1989-1-LW-178 (cited supra)** was clarified in the judgment reported in **2011 (6) CTC 268 (N.Rajendran ..vs.. Shriram Chits Tamil Nadu Pvt. Ltd.)**. In **Civil Revision Petition Nos.1457 and 1458 of 2018 (T.Natarajan ..vs..S.Tejraj and another)**, it was made clear and observed by this Court that Executing Court has power to condone the delay in filing an application under Order XXI Rules 105 and 106 CPC. He further submitted that the suit was decreed on 30.11.2005. EP was filed in 2006. Thereafter, appeal proceedings in A.S.No.858 of 2006 was pending and the matter was taken to Hon'ble Supreme Court by way of Special Leave Petition. This Court has ordered in A.S.No.858 of 2006 to keep the EP in abeyance. The respondents were under the impression

that the EP would be kept pending, but the Executing Court closed the EP on 07.02.2017. When the EP was restored, as per the order in EA No.3078 of 2018 for restoring the EP.No.1950 of 2006, the petitioner preferred Civil Revision Petition (NPD) No.3126 of 2019. This Court, finding that no such order can be passed as 'closed', set aside the order of restoration of EP and directed the respondents to file necessary petition under Section 5 of the Limitation Act with enabling provisions under Order XXI Rules 105 and 106 CPC. It was also observed that the Executing Court has to take a pragmatic view in the delay condonation petition filed for restoring the EP. Thereafter, respondents filed E.A.No.5 of 2020 for restoring the E.P.No.1950 of 2006. Learned Executing Court considered all the aspects and allowed the petition. Therefore, learned counsel for the respondents prayed for confirming the order of learned X Assistant Judge, City Civil Court, Chennai and prayed for dismissal of this Civil Revision Petition.

6. Before going to the legal position as to whether Section 5 of the Limitation Act is applicable to proceedings under Order XXI Rule 105 and 106 CPC, it is necessary to understand the background leading

to filing of E.A.No.5 of 2020. The respondents filed the suit in O.S.No. 6686 of 1996 for the relief of specific performance of execution of sale deed, delivery of possession and costs. The suit was decreed on 30.11.2005. Respondents filed Execution Petition in E.P.No.1950 of 2006. The petitioners filed A.S.No.858 of 2006. This Court passed an order on 15.12.2006 directing the EP to be kept in abeyance and directed the appeal to be posted for final disposal. Based on the orders of this Court, the EP was getting adjourned periodically. On 07.02.2017, the EP was closed on the ground that it was pending from 2006 and despite orders for the appearance of parties, no one was present and no data is found with regard to the pendency of appeal in the High Court Case Status Information System. A.S.No.858 of 2006 was listed for final hearing and dismissed on 15.02.2018. The petitioners filed SLP before the Hon'ble Supreme Court and that was dismissed on 29.10.2018. Then the respondent filed E.A.No.3078 of 2018 to reopen the Execution Petition in E.P.No.1950 of 2006 and that petition was allowed on 06.07.2019. As said earlier, the petitioner filed CRP. (NPD) No.3126 of 2019 challenging the orders passed in E.A.No.3078 of 2018 on 06.07.2019. That was disposed on 16.10.2019 giving direction to the

respondents to file petition under Section 5 of the Limitation Act read with Order XXI Rules 105 and 106 CPC, for condoning the delay in filing the petition for restoring the Execution Petition. Accordingly, E.A.No.5 of 2020 was filed and that petition was allowed. Against the said order, the Civil Revision Petition is preferred.

7. The aforesaid sequence of events shows that this Court ordered E.P.No.1950 of 2006 to be kept in abeyance when the appeal was pending. The Executing Court has closed the EP suo-motu for the reason that despite orders passed for appearance of parties, no one was present and there is no data available in the High Court Case Status Information System with regard to the pendency of appeal and therefore, closed the EP on 07.02.2017. It has to be borne in mind that not only the respondents, but the petitioners were also not present before the Court. It is submitted by the respondents that they were under the bonafide impression that the EP would be adjourned automatically as it was being done earlier because of the order passed by this Court in A.S.No.858 of 2006 to keep the EP in abeyance. Only after the closure of EP on 07.02.2017, the appeal in A.S.No.858 of 2006 was dismissed on

15.02.2018 and SLP filed by the petitioner was dismissed on 29.10.2018. It appears that the respondents were not aware of the closure of EP. The Executing Court had suo-motu closed the EP when the appeal was pending, especially when it was ordered in the appeal to keep the EP in abeyance. The respondents have filed the petition to restore the EP within 30 days from the knowledge of the closure of the EP. In the considered view of this Court, the petition to restore the EP was filed within the time. The petitioners agitated against the order passed in E.A.No.3078 of 2018 and filed Civil Revision Petition (NPD) No.3126 of 2019. As per the orders passed in that Civil Revision Petition, the present E.A.No.5 of 2020 came to be filed and disposed. Therefore, this Court finds that on facts as well as law, the respondents are well within the right to file this petition for condoning the delay in filing a petition to restore the EP, which was closed and that was rightly allowed by the Executing Court.

8. Coming to the legal position canvassed by the learned counsel for the petitioners relying on the judgment reported in **1989-1-LW 178 (cited supra), (2005) 7 SCC 300 (cited supra)** and other

judgments which had followed these judgments for the proposition that Section 5 of the Limitation Act is not applicable to the proceedings under Order XXI Rules 105 and 106 CPC. Learned counsel for the respondents referred the judgment reported in **(2011) 6 CTC 268 (cited supra)**. While considering the law on this aspect, especially previous judgments and the judgments reported in **1989-1-LW-178 (cited supra)**, Hon'ble Mr.Justice V.Ramasubramanian (as he then was) clarified the judgment reported in **1989-1-LW-178 (cited supra)** and observed that the Division Bench did not address the amendment made by this Court with effect from 01.11.1972 by which sub-rule (4) to Rule 105 was deleted and proviso was inserted under sub-rule (3) itself to Rule 105. In other words, the Division Bench did not deal with the deletion of sub-rule 4 of Rule 105 of High Court amendment issued with effect from 01.11.1972. The Division Bench also did not deal with the insertion of proviso under sub-rule 3(1) of Rule 105 by the High Court amendment with effect from 01.11.1972. This proviso provided that an application may be admitted after the said period of 30 days, if the applicant satisfied the court that he had sufficient cause for not making the application within such period.

9. The consequences of Madras High Court amendment made with effect from 01.11.1972 are:

(i) the conflict between Section 5 of the Limitation Act, 1963 and Order XXI Rule 105(4) got resolved with deletion of sub-rule 4.; and

(ii) the power to condone the delay was conferred upon the Executing Court by a rule of procedure traceable to the proviso under Rule 105(3) itself, rather than to an extraneous enactment, such as the Limitation Act, 1963. It is observed in the judgment as follows:-

31. The non applicability of the provisions of Section 5 of the Limitation Act, 1963, as pointed out by the Division Bench in Natarajan,N.M., flowed out of the very statute itself. As pointed out earlier, Section 5 of the Limitation Act, 1963, begins with a statement "any appeal or any application other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908". Therefore, the Division Bench was convinced to hold that in the light of the express bar under Section 5 of the Limitation Act, 1963, Sub-Rule (4) of Rule 105 of Order XXI cannot stand. To put it differently, if Sub-Rule (4) of Rule 105 (as it stood prior to 1976) was allowed to stand, a very piquant situation would have arisen, viz., Section 5 of the Limitation Act, 1963 which

makes it inapplicable to the proceedings under Order XXI would stand in conflict with Rule 105(4) which made it applicable. There was only one way this conflict could be resolved, viz., by allowing [Section 5](#) of the Central Act to stand and allowing the destruction of Sub-rule (4) of Rule 105, which was only a High Court Amendment.

*32. Therefore, the Division Bench found that the conflict could be easily resolved by holding that Sub-rule (4) of Rule 105 stood repealed impliedly by [Section 97\(1\)](#) of the Amending Act 104 of 1976. But, this exercise itself was redundant, in view of the fact that Sub-rule (4) of Rule 105 was not at all in force when the Division Bench considered the case in *Natarajan, N.M.*, as it had been deleted by the High Court Amendment with effect from 01.11.1972. Hence, the said decision of the Division Bench, cannot be taken to be providing the ratio decidendi for deciding the issue on hand.”*

10. It was further observed that, “Therefore, what should be taken to have been repealed would be those provisions of the State or High Court Amendment, which became inconsistent with the amendments introduced. There is nothing on record to show that the proviso to Sub-rule (3) of Rule 105, which would now become the

proviso to Sub-rule (3) of Rule 106 of Order XXI, is, in any way, inconsistent with the amendments introduced either in 1976 or in 1999 or even in 2002. So long as the proviso under Sub-rule (3) is not shown to be inconsistent with any of the amendments, it cannot be stated to have been repealed under the Central Amendment Acts. Therefore, it was held that refusing to entertain the application on the ground that it was filed beyond 30 days and that there was no power to entertain the same, is not in accordance with law". This judgment was followed in the order of this Court dated 28.10.2020 in ***Civil Revision Petition Nos.1457 and 1458 of 2018 (T.Natarajan ..vs..S.Tejraj and another)***. This Court is in respectful agreement with the proposition laid down in ***(2011) 6 CTC 268*** (cited supra). That apart, it was already found on facts that the Executing Court suo-motu closed the Execution Petition. Execution Petition was not dismissed. As per the direction given in CRP (NPD) No.3126 of 2018, respondents filed petition under Section 5 of Limitation Act read with Order XXI Rules 105 and 106 CPC for condoning the delay in filing the petition for restoring the Execution Petition. Respondents filed the petition to restore the Execution Petition within 30 days from the knowledge of the closure of Execution Petition.

Therefore, respondents are well within their right to file a petition for condoning the delay in filing a petition to restore the Execution Petition.

11. Therefore, this Court finds that the Executing Court has rightly allowed the petition. This Court finds no reason to interfere with the order of the learned X Assistant Judge, City Civil Court, Chennai and the order of learned X Assistant Judge, City Civil Court, Chennai. passed in E.A.No.5 of 2020 in E.P.No.1950 of 2006 in O.S.No.6686 of 1996 on 09.03.2021 is hereby confirmed and this Civil Revision Petition is dismissed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

mra

08.10.2021

Index : Yes

Internet : Yes / No

Speaking order : Yes / No

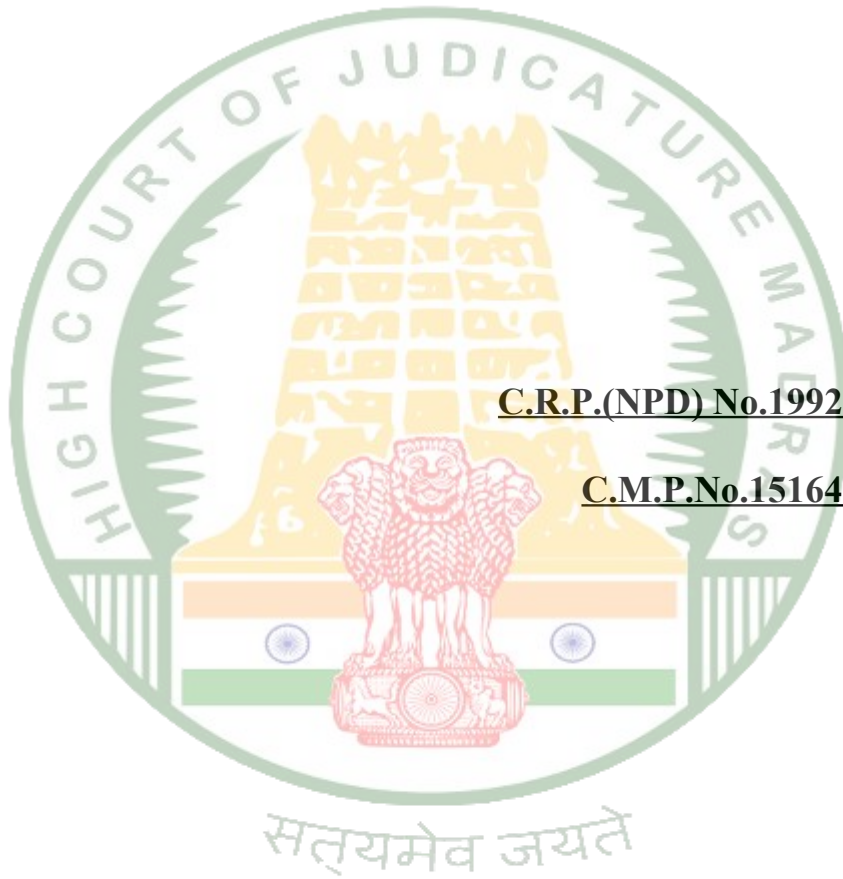
To,

1. The X Assistant Judge, City Civil Court, Chennai.

C.R.P.(NPD) No.1992 of 2021
and
C.M.P.No.15164 of 2021

G.CHANDRASEKHARAN, J.

mra



order in

C.R.P.(NPD) No.1992 of 2021
and
C.M.P.No.15164 of 2021

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